

**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Wolf Creek Nuclear Operating Corp.,	)	
	)	
Employer,	)	
	)	
and	)	
	)	
United Government Security Officers	)	
Of America International Union,	)	
and its Local 252	)	
Petitioner,	)	Case No. 14-RC-160836
	)	
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**BRIEF IN SUPPORT OF REQUEST FOR REVIEW**

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On October 6, 2015, Hearing Officer Carla K. Coffman opened the hearing in this matter to hear testimony on two issues, whether the petitioned for unit should be excluded due to bargaining history of the Parties, and whether the petitioned for unit are managerial employees. Testimony was presented regarding the issues set for hearing and the record was closed on October 6, 2015. On October 14, 2015, the Regional Director issued his Decision and Order dismissing the petition. Pursuant to the Order of the Board on February 9, 2016, the Petitioner's Request for Review was granted with respect to the issue of whether the Employer's security training instructors are managerial employees.

## **I. Facts of the Case.**

The following are the pertinent factual findings made by the Regional Director in the Decision and Order:

- The Security Department manager is responsible for the overall security of the Employer's facility. The Security Department is broken down into Security Operations and Security Support, each overseen by a superintendant. The Security Support superintendent oversees the training supervisor, access authorization supervisor, and the security support supervisor, all of whom supervise various other non-SO security personnel. The training supervisor supervises the four SIs at issue here.
- NRC Regulatory Guideline 5.75 requires the Employer to have a training program. SOs must be certified, through this training program, to perform their duties as security officers.
- Certification is attained through classroom instruction implemented by SIs who verify completion of each element of training followed by on-the-job training implemented by SO lieutenants and/or sergeants.
- Training subjects are extensive and dictated by the NRC Guideline 5.75, Appendix B, and provide for training in 28 specific job functions, although additional training can be required by the Employer. For example, SOs are trained on the use of pepper spray, handcuffs, protective gear, suspect control and restraint tactics, performance of duties while wearing a gas mask, and other SO-related duties. SOs also receive firearms training and certification which is paid for by the Employer.
- SOs, including SO supervisors, go through a quarterly training cycle to maintain

certification of the Appendix B requirements. Training is done through additional classroom instruction as well as small “tabletop” drills simulating various real life security-related scenarios on 3D models of the Employer’s facility. Large force-on-force simulated security threat drills are conducted annually on the facility grounds. The SOs are assigned to one of six blocks. Accordingly, 24 quarterly training drills are conducted annually.

- In addition, SOs, including SO supervisors, must be recertified in use of their firearms. Failure to re-qualify may jeopardize retention; however, such SOs would be retrained by the SIs and brought up to appropriate levels performance.
- SIs are assigned to the security support side of the Security Department and are supervised by the training supervisor.
- SIs are not assigned to specific posts; rather, they work at the security building performing classroom instruction or at the firing range overseeing its operation and performing firearm training and qualifying of the SOs and SO supervisors. Because the SIs perform their duties at different locations, they are not directly supervised by the training supervisor on a day to day basis.
- The SIs’ primary role is to provide initial and continuing educational training to the SOs, including the SO supervisors, enabling them to implement physical security at the Employer’s facility.
- SIs develop lesson plans and design training programs, and create rules<sup>1</sup> for the protection of the Employer’s property and personnel to satisfy NRC guidelines. SIs utilize NRC regulation 5.75 as guidance for the creation of their lesson plans covering each of the NRC required subject areas. SIs also utilize Operational Experience information obtained from similar facilities and incorporate it into their lesson plans if applicable to the specific demands of the Employer’s operation and facility. SIs also determine whether subject matter experts, someone with specific expertise in a particular security area, will be brought in to facilitate training. The SIs also may reach out to contacts at other agencies or similar employers for additional teaching modules. Lastly, SIs use their own occupational experiences as teaching material.
- SIs are responsible for revising their lesson plans to incorporate new or changed NRC regulations, changes in past practice, and changes in management expectations. After an SI creates a new or updates an existing lesson plans it is possibly reviewed by an end-user such as an SO for technical accuracy, and then reviewed by the training supervisor and approved by the Security Support superintendent.

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<sup>1</sup> There is no evidence in the record establishing that SI’s “create rules.” The evidence establishes that they take already prepared material dictated by NRC Guidelines and incorporate it into a lesson plan.

- SIs can train SOs on areas above those required by the NRC, such as when the Employer has additional equipment for security use not covered by the NRC, but the SIs cannot train on fewer functions than the NRC dictates.
- During classroom instruction, the SIs teach from the created lesson plans. The SIs decide whether other documents will be handed out to the SOs, if and what instructional videos will be shown, and whether subject matter experts will lecture.
- The SIs do not certify SOs' qualification of the classroom training subjects; rather, the SIs note the date and completion of the training on qualification cards for each specific job function which is then verified by the training supervisor. The SOs' supervisors conduct on-the-job training and certify that the SO is qualified in the various subject areas.
- After completion of classroom and on-the-job training, SOs take written exams covering each subject area. The SIs write the various exams by drawing from a database of exam questions ensuring that there are questions covering each subject area. The questions drawn from the database were initially written and submitted by SIs. SO supervisors and SOs may also write questions for potential use in an exam. All questions are approved by the training supervisor before being uploaded into the database.
- In addition to classroom training, SIs also train and certify SOs and SO supervisors on firearm qualifications. The Employer pays for the SIs certification every 3 years to instruct and certify the SOs and SO supervisors on firearms usage. In addition to firearm training and qualifying, the SIs are solely responsible for the operation of the firing range, including giving users a safety briefing, explaining the qualifying agenda and course of fire, checking out/in of weapons, adjusting of sights on the weapons, ensuring proper maintenance of weapons, and control of participating students.
- If an SO engages in misconduct on the range, the SI is responsible for reporting the SO to the SO's direct supervisor.
- SIs also provide feedback to SOs on their firearm skills and readiness, and certify them when they have met all qualifications. SOs are permitted more than one attempt at firearm qualification. After each failed attempt, the SI notifies the training supervisor as well as the SO's supervisor of record. The SI determines whether retraining is required before permitting additional attempts to qualify. After failing a third attempt, the SI can recommend whether the SI believes the SO will succeed.
- Although not cited by the Regional Director, the record also established that the SI does not determine if the SO qualifies since that is judged on a pass/fail basis

depending on the score of the shoot.

- In addition to classroom instruction, and firearms training and certification, SIs also design, instruct, implement, and evaluate the quarterly “tabletop” tactical response drills and annual force-on-force exercises mentioned above. The SIs design the drills and exercises to comply with the NRC guidelines.

### **III. Law and Argument.**

#### **A. Standard for Managerial Employees.**

The Act makes no specific provision for “managerial employees.” However, under Board policy, this category of personnel has been excluded from the protection of the Act. See *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *Ladies Garment Workers v. NLRB*, 339 F.2d 116, 123 (2<sup>nd</sup> Cir. 1964); *Ford Motor Co.*, 66 NLRB 1317 (1946); and *Palace Dry Cleaning Corp.*, 75 NLRB 320 (1948).

“Managerial employees” have been defined by the Supreme Court in *NLRB v. Yeshiva University*, *supra* at 682-683, as:

[T]hose who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.” *NLRB v. Bell Aerospace Co.*, *supra*, at 288, 94 S.Ct., at 1768 (quoting *Palace Laundry Dry Cleaning Corp.*, 75 N.L.R.B. 320, 323, n. 4 (1947)). . . . Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. [citations omitted] Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.

The party seeking to exclude an individual as managerial bears the burden of proof. *LeMoyne-Owen College*, 345 NLRB 1123, 1128 (2005); *Waste Management de Puerto Rico*, 339RB 262, 279 (2003).

#### **B. The Case Law Cited in the Decision is Inapplicable.**

The Decision and Order erroneously expanded on this law and applied irrelevant case law.

The Decision cites the case of *Miller Electric Co.*, 301 NLRB 294 (1991) and argued that, “personnel who formulate and implement safety programs, provide instruction to other employees on safe work habits, effectively recommend disciplinary measures, and express employer policies to other employees, have interests that are more closely aligned with management...” Decision, at p. 12. However, that is not what the decision in *Miller Electric* held. In that case, the Board found “numerous indications” that led it to believe the employee was aligned with management, including: 1) he had sole responsibility for all aspects of the training department, 2) he was an exempt employee, 3) he created the manual used to train instructors who, in turn, trained the employees, 4) the training included instruction in how to discipline employees, communication and motivation, and 5) he created the training for supervisors. *Miller Electric*, 301 NLRB at 298-299.

In addition, the Decision cites the case of *Peter Kiewit Sons’ Co.*, 106 NLRB 194 (1953). However, the Board found that lecturers were managers because they, in part, expressed company policies, including labor relations policies. *Id.* at 196. Likewise, the decision in *Miehle Printing Press & Manuf. Co.*, 113 NLRB 1252 (1955), is inapplicable because the Board found a safety inspector to be a managerial employee based on three factors: 1) formulated and implemented safety policies, 2) represented management in committee, and 3) had the authority to recommend discipline. *Id.* at 1253.

**C. The SI’s Do Not Have the Same Level of Management Discretion and Do Not Formulate Policy.**

In this case, the facts do not bear out the same level of managerial discretion as noted in the cases above. SI’s do not have responsibility for the security training department since they are overseen by a supervisor and security superintendent. Furthermore, SI’s do not create the training program or formulate security policy; that is dictated by the extensive regulations

contained in NRC Regulatory Guide 5.75. This is an important point because the record established that there is no independent judgment in what topics to teach. NRC Regulatory Guide 5.75 states, on Page 6, the following:

The specific regulatory requirements for nuclear power reactor physical protection programs appear in 10 CFR Part 73 (for the purposes of this document, physical protection program refers to the prevention of significant core damage and spent fuel sabotage, implementation of the Commission- approved security plans, licensee response strategy, and implementing procedures). **Licensee and applicant training and qualification plans must describe how the requirements in Section VI of Appendix B to 10 CFR Part 73 will be implemented.** Consistent with 10 CFR 73.55(d)(3)(i) and Section VI, paragraph A.2, of Appendix B to 10 CFR Part 73, the licensee must ensure that security personnel are adequately trained, equipped, and qualified to effectively perform their assigned duties and responsibilities related to the implementation of the site physical protection program and protective strategy, consistent with NRC regulations and NRC-approved security plans. **The performance-based requirements of Section VI of Appendix B to 10 CFR Part 73 provide the minimum training and qualifications for individuals assigned to implement the physical protection program at NRC-licensed nuclear power reactor facilities.** Implementation of these requirements at each site must consider site-specific conditions to ensure that the licensee's training and qualification program provides the site-specific knowledge, skills, and abilities that individuals need to effectively protect against the DBT of radiological sabotage. [emphasis added]

10 C.F.R. §73, Appendix B, in turn, provides the curriculum that must included in the security training program. This extensive document details all the areas that are required in the SO's training. The SI's do not have any discretion in what to teach, or for that matter, how to teach it. They can only determine what content is used to teach these subjects. In this sense, they do not formulate policy or a program.

This is where the Decision was wrong when it declared that the creation of security training lesson plans constitutes "formulating policy" under *NLRB v. Yeshiva, supra*. Decision, at p. 14.

The Supreme Court found that the professors in *Yeshiva* decided what courses would be offered, when they were scheduled, to whom they were taught, dictated teaching methods, created grading policies, decided matriculation standards, and effectively decided which students would be “admitted, retained, and graduated.” *Yeshiva*, 444 U.S. at 686. On this basis the professors were found to have “formulated policy.” In this case, the course of instruction is dictated by NRC Guide 5.75 and Appendix B of 10 C.F.R. Part 73, the timing of the training and who was trained was dictated by the Employer, the training methods (written test, range qualification, table-top exercises and force-on-force drills) were dictated along with the training subjects, the passing or qualifying scores are dictated by NRC regulations, and the SI’s had no discretion in who to train, who would be retained and who qualified.

Moreover, the training does not include managerial topics such as discipline, company policy or motivation, but deals strictly with security plans. The SI’s do not represent management in any committee or before other employees. And the SI’s do not have the ability to discipline another employee. In fact, the record reflects the facts that they cannot even address discipline problems during training but must refer SO’s to their supervisors. Most telling is the fact that SI’s do not use any objective judgment in determining whether an SO satisfactorily completes training. The SI Supervisor and direct supervisors of the SO’s sign off on their instruction and the qualification for range qualification is determined by a passing score based on where the SO shoots a target.

**D. The SI’s Are Most Similar To Non-Managerial Trainers.**

The SO’s are more closely associated with employees who have been found to be non-managerial. *Fairfax Family Fund, Inc.*, 195 NLRB 306, 308 (1972)(an instructor who did not formulate collection policies but merely trained employees in collection policies, and who was



supervised by a manager was not a managerial employee); *Rockspring Development Inc.*, 353 NLRB 105 (2009)(safety coordinator who worked under a safety supervisor and who prepared safety training that was given to supervisors, was not a managerial employee because the training was composed of material from others and dictated by safety agencies).

The case most on point with the work of the SI's is *Roofing, Metal & Heating Assoc.*, 304 NLRB 155 (1991). In that case the Board found that a trainer was not a managerial employee because his curriculum was dictated by employer policy, he provided classroom and simulated training exercises in a training facility, he did not have the authority to select or dismiss students/candidates, he determined if a candidate was deficient in training and recommended remedial work, and reported the completion of a candidate's training. On this record, the Board held:

On the basis of the entire record, noting particularly, that Sullivan spent the great bulk of his time as an instructor with virtually no power or authority to act autonomously in any meaningful sense or deviate from the Fund's or the JAC's established policies, I reject the contention that Sullivan, as an apprentice instructor, was so aligned with management to justify denying him rights guaranteed employees under the Act. Accordingly, I find that Sullivan was not a managerial employee.

*Roofing, Metal*, 304 NLRB at 161.

The similarities to the SI's work are obvious. The SI's did not create the curriculum, that was dictated by NRC Guide 5.75 and Appendix B of 10 C.F.R. §73. The SI's are told who they will train and do not have the ability to turn a SO away. Similar to the trainer in *Roofing*, the SI's provide classroom and simulated exercises in a training facility. They also record passing marks and can recommend remedial training.

#### **IV. Conclusion.**

For this reason, the Board must find that the security training instructors are not

managerial employees.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

The foregoing was filed by electronic means pursuant to the National Labor Relations Board e-file system this 23<sup>rd</sup> day of February, 2016 and served upon the following via electronic mail:

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